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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 344

HARRY G. ALKER, Jr., *Petitioner*,

v.

GEORGE M. HUMPHREY, Secretary of the Treasury,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

HARRY J. ALKER, JR., *Petitioner*,

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harry J. Alker, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on April 11, 1957.

OPINIONS BELOW

The United States District Court for the District of Columbia granted a summary judgment on May 8, 1956. The Opinion of the United States Court of Appeals is attached hereto as an Appendix.

JURISDICTIONAL STATEMENT

This action was brought under the provisions of Sections 3 and 9 of the Administrative Procedure Act of 1948, 40 Stat. 238, 5 U.S.C.A., Section 1009. The Court below had jurisdiction by virtue of 28 U.S.C. Sec. 1331, and Sec. 10 of the Administrative Procedure Act. This Court has jurisdiction upon appeal to review the judgment below under U.S.C. Title 28, Sec. 1291.

STATEMENT OF THE CASE

Your Petitioner, Harry J. Alker, Jr., a practicing attorney, is a member of the bar of the highest Court of the State of Pennsylvania since 1913. He has been admitted to practice before the Treasury Department since 1920. A renewal card to practice before the Department was issued in 1952.

The Director of Practice, Treasury Department, after the required Preliminary Notice, instituted disbarment proceedings against the Petitioner and filed a Statement of Charges dated December 16, 1953. Petitioner thereupon requested a Bill of Particulars for more specific information in order to prepare properly his defense.

An order was entered, directing that a Bill of Particulars be filed. The Director of Practice thereupon filed more specific charges in accordance with the order of the Examiner. An answer was duly filed to the charges by the Petitioner on February 24, 1954.

A hearing on the charges was originally scheduled for Tuesday, March 16, 1954, but was postponed to March 30, 1954, because March 15 was the return date for the filing of income tax returns and the Petitioner was too busy to adequately prepare his defense. This

hearing was subsequently postponed several times at the request of Francis E. Walter, Esquire, Attorney for the Petitioner. A hearing was finally fixed for May 20, 1954.

On May 17, 1954, Mr. Walter, Counsel for the petitioner, requested a continuance of the hearing in the matter because of the physical inability of the petitioner to appear. Mr. Walter so advised the Examiner by a certificate from a physician setting forth the illness of the Petitioner, and his inability to appear at a hearing. The Examiner then fixed May 20th as the time for the hearing.

The hearing convened and Mr. Edwin Hall II, an associate of the petitioner, appeared and stated that he was present because your petitioner was not able to be present and that his counsel, Congressman Walter, was in Washington. That in support of his motion for a continuance he was offering the testimony of the petitioner's physician and of his dentist (JA 14).

Mr. Hall in support of his motion for a continuance presented Doctor Moore, petitioner's physician, and two of his dentists.

The testimony of Doctor Moore may be summarized as follows (R. 14, 15):

The petitioner had been under his professional care for some eleven years for gastric ulcers which at times of excitement will cause the pylorić end of the stomach to close, so that no food can enter that organ. The petitioner had at the time of the hearing an abscess on his right eye and it also appeared that another abscess was forming. The one abscess had been excised and medication applied, and the petitioner had been ordered to wear a black patch on his eye, also to remain

in his apartment. The petitioner was on a soft diet because of the ulcers and this has caused his teeth to abscess.

That at intervals it is necessary to use a stomach pump on the petitioner when the stomach closes.

Doctor Moore stated that he had advised the petitioner to rest and that he was not well enough to appear in Court or at the Treasury Department to represent clients (Tr. 11). Doctor Moore also testified that the petitioner *could attend a hearing of his case in about sixty days.* Also Doctor Moore's letter of May 18, 1954 was introduced and identified.

Dr. John Jacob Stetzer, Sr., a practicing dentist, testified that the petitioner had several abscessed teeth exuding pus which should be removed. That if said teeth were extracted, the appellant could resume his profession in five or six weeks.

Dr. John Stetzer, Jr., testified that he was a dental surgeon, that the petitioner had several teeth that should be extracted, and that at the time of the hearing his physical condition prevented any extraction. That it would be six or eight weeks after all the abscessed teeth were extracted before the appellant could resume his usual routine.

The Government presented five investigators of the Bureau of Internal Revenue who had evidently been detailed to keep the petitioner under surveillance. These witnesses testified that the petitioner had been in his office, at the Bureau of Internal Revenue, and had attended a calender call at a session of the Tax Court between May 14, and 18; also, that the petitioner also failed to follow his doctor's orders and did not wear a black patch over his infected eye. The Govern-

ment did not offer any medical testimony to rebut the testimony of Dr. Moore and only presented the evidence of the investigators as set out above. In his argument the attorney for the petitioner suggested that the Examiner have his own physician examine the petitioner to determine his physical condition but this suggestion was not accepted. The Examiner stated your petitioner was a sick man (Tr. 100) but denied petitioner's motion for a continuance and ruled that the Government should present its case.

The hearing proceeded without the presence of your petitioner or his counsel, who as stated previously, were not in Philadelphia. Thereafter, both sides submitted proposed findings, conclusions of law, etc., to the Director of Practice.

On February 11, 1955, the Hearing Examiner submitted findings and recommended disbarment (R. 32, 33, 34, 35, 36). Appellant then appealed to the Secretary of the Treasury (R. 8, 9, 10). On January 31, 1956, the Acting Secretary of the Treasury, H. Chapman Rose, affirmed the decision of the Hearing Examiner but granted the petitioner the opportunity for a *further* hearing, provided that within 20 days he (1) made a formal written request for a hearing, (2) consented to the temporary suspension of his enrollment pending *final determination of the administrative proceeding*, and (3) *surrendered his enrollment card until termination of the suspension.* The decision also provided that if the petitioner did not request further hearing in accordance with the three conditions, the recommended decision of the Hearing Examiner would be affirmed and an order of disbarment would be entered by the Director of Practice upon the expiration of the 20-day period. Your petitioner refused to comply with

the condition, and on February 28, 1956, an order of disbarment was signed by the Acting Director of Practice. This suit was instituted on March 1, 1956. On March 2, 1956, a stipulation was entered into between the United States Attorney for the District of Columbia, and petitioner's counsel which provided

> "IT IS HEREBY STIPULATED by and between the parties hereto that pending determination of plaintiff's motion for a preliminary injunction the defendant will give no further notice to the Internal Revenue Service of the decision by the Secretary January 31, 1956, in the proceedings against Mr. Alker, Complaint No. 1050, and will not publish the decision in the Cumulative Bulletin of the Internal Revenue Service or otherwise publish the same." (R. 5)

The Trial Court granted the Government's motion for summary judgment on May 7, 1956, and it is from this order an appeal was taken. The United States Court of Appeals for the District of Columbia Circuit in an order dated May 25, 1956, directed that the aforementioned stipulation remain in effect.

QUESTIONS PRESENTED

1. Whether the trial examiner exercised an abuse of discretion in not granting a continuance to the appellant who was ill and unable to appear in court?

2. Whether the appellant received a fair hearing under 5 U.S.C. Sec. 261 and the rules and regulations thereunder?

STATUTES AND REGULATIONS

The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons,

agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing, suspend and disbar from further practice before his department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner wilfully deceive, mislead, or threaten any claimant or prospective claimant, by word, circular or advertisement. (July 7, 1884, ch. 334, Sec. 3, 23 Stat. 258).

1949 Edition, Code of Federal Regulations:

> Sec. 10.7 *Proceedings for disbarment, suspension, and reinstatement*—(a) *Proceedings for suspension and disbarment.* If an officer or employee of the Treasury Department has reason to believe that an enrolled attorney or agent has violated any provision of the laws or regulations governing practice before the Treasury Department, or if a complaint concerning any enrolled attorney or agent is made to any such officer or employee, he shall promptly make a written report thereof to the attorney for the Government. If any other person has information of such violations, he may also make written report thereof to the said attorney. The attorney and the Committee will treat as strictly confidential the identity of the informant in any case in which the informant is other than an officer or employee of the Treasury Department, unless the informant in giving his information states that his identity and connection therewith are not confidential.

(b) *Rules of procedure.* The Attorney for the Government may, either on the basis of such information or upon his own motion where he has cause to believe that any enrolled attorney or agent has violated any provision of the laws or regulations governing practice before the Treasury Department, institute proceedings for suspension or disbarment against any enrolled attorney or agent, hereinafter called the respondent in this paragraph, by filing with the Committee a statement of charges signed by the attorney for the Government. Subject to the provisions of the Administrative Procedure Act (60 Stat. 237), such proceedings shall be governed by the following rules:

* * * *

(18) *Hearings.* Subject to this paragraph the examiner may determine the time, place, and manner in which hearings shall be conducted; the form in which evidence shall be received; and may adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of suspension, disbarment, and reinstatement cases. Written notice of the time and place of all hearings shall be given the respondent in the manner provided in this paragraph for the service of papers. No hearing shall be held in less than 10 days from the date of service on the respondent of the notice of such hearing, except that the examiner may postpone or adjourn hearings when necessary or desirable, on notice to the parties.

SUMMARY OF ARGUMENT

1. The granting of continuance is within the discretion of the trial court unless there is an abuse of discretion. The trier of the facts must not exercise his discretion arbitrarily or capriciously but in accordance with fixed judicial principles and with a view to promoting substantial justice.

2. Under 5 U.S.C., Section 261, and the rules and regulations thereunder, as well as under basic considerations of due process, the Secretary could not lawfully disbar petitioner without a hearing. The Secretary cannot avoid its statutory obligation of granting petitioner a hearing by stating in its decision that the petitioner will be offered further opportunity for a hearing, provided that within twenty days after receiving decision he makes such application and surrenders his enrollment card to practice until proceedings are terminated.

ARGUMENT

1. The granting of continuance is within the discretion of the Trial Court unless there is an abuse of discretion.

This has always been the rule and it has always been the rule that where an error in the exercise of discretion results in a hardship and injustice that appellate review will be exercised.

The trier of the facts must not exercise his discretion arbitrarily or capriciously but in accordance with fixed judicial principles and with a view to promoting substantial justice.

The Secretary in this case has always conceded that the appellant was a sick man on the date of the hearing, May 20, 1954, but contends that his application for a continuance was not brought in good faith.

The good faith of the petitioner is shown by his offer to submit to an examination by a physician of the examiner's choice. This clearly proves that petitioner's application for a continuance was because of the petitioner's physical condition.

This Court in the case of *Cornwell* v. *Cornwell, et al.*, 73 App. D.C. 233, 118 Fed. 2d 396, stated:

> "Where motion for continuance on ground of plaintiff's illness was denied and judgment entered against her, and motion for vacating of judgment and for new trial were supported by affidavits that plaintiff, who was her own most material witness, was not in condition to be present at trial, and where record failed to show lack of good faith or that injury might have resulted to defendant from a continuance, refusal of motion to grant new trial was error."

In the instant case not only was a certificate from the petitioner's doctor transmitted to the Hearing Examiner, but the physician, Doctor Moore, testified at the hearing that appellant was unable to appear for trial. Also, it has been admitted by the Government that the petitioner was a sick man. This was also conceded by the Hearing Examiner who stated "Mr. Alker is basically a sick man."

There was no showing made that the Government would suffer any damage by continuing the matter until the petitioner's condition improved (R. 25). In *Etty* v. *Middleton*, 62 A. 2d 371 (Mun. Ct. D.C.), where the question was whether the trial court improperly overruled defendant's motion for a continuance, the Court said:

> "and in this jurisdiction it has been held that action on a discretionary matter is subject to appellate review where the error in its exercise is plainly shown and works material hardship and injustice. We think there can hardly be a doubt that material injustice and hardship have resulted from the ruling in this case one of the most important rights of a party litigant—the right to be present at the trial of her case—was taken from

> her, and what followed was not a trial upon the merits but really little else than an ex parte hearing, and it was ex parte because defendant, despite her own illness and the more critical illness of her husband, was denied an opportunity to come into court, confront her accusers and tell her side of the story. It was error to refuse her that opportunity." (citing many cases)

This Court in the case of *Harrah* v. *Morganthau*, 67 App. D.C. 119, 89 F. 2d 863, stated that refusal to grant a continuance because of plaintiff's illness held reversible error, where plaintiff, who was his only witness, was so ill that appearance in Court would probably have resulted in death and there was no showing that continuance would have resulted in serious loss to other parties.

The appellee's argument that the petitioner had many opportunities for a hearing is without merit.

The instant case was first scheduled for hearing March 16, 1954, or one day after the date for the filing of income tax returns. It is obvious that the office of any tax lawyer would be flooded with work at this time, making it impossible to prepare for a hearing of this kind. Also the April dates were set up when petitioner's counsel would be out of the country. This fact necessitated the request for continuance, furthermore only about sixty days elapsed between the time the case was first scheduled and the date when the Examiner denied petitioner's motion.

In the case of *Goldsmith* v. *Board of Tax Appeals*, the Court stated:

> "The Rules of the Board of Tax Appeals provides that the Board may in its discretion deny admission, suspend or disbar any person.

"But this must be construed to mean the exercise of a discretion to be exercised after fair investigation with such *notice, hearing* and *opportunity* to *answer* for the *applicant* as *would constitute due process*. Also see *Garfield* v. *United States ex rel Spalding*, 32 App. D.C. 158; *United States ex rel Wedderburn* v. *Bliss*, 12 App. D.C. 485; *Phillips* v. *Ballinger*, 27 App. D.C. 46." (Emphasis supplied)

In the case of *Betts* v. *Jardine*, 139 P. 657 (Calif. App. 1917) an application for a continuance was made to the trial court, supported by an affidavit averring that the appellant had suffered a stroke of apoplexy. On advice of a physician he visited Europe. The undisputed affidavit indicated that the appellant alone could prove and establish his defense. It was further shown he would return in two months. The Court of Appeals held that the lower court abused its discretion and should have granted the continuance. Similar to instant case, the appellant is the only person who could establish his defense.

In the case of *Connell* v. *Long*, 32 Ga. 443 it appeared that one of the parties was ill and unable to be present at the trial. His attorney advised the court that he could not safely go to trial without the presence and aid of his client. It was held that the continuance should have been granted. The attorney was unable to conduct the examination as he may have done by the aid of his client, who might even have suggested witnesses, who could have contradicted the plaintiffs. Surely, the appellant's presence would be needed in the instant case, he is an attorney and his knowledge of the facts and of the people concerned would be invaluable.

And in *Hollis* v. *Watson*, 28 Ky. L.R. 550, 89 S.W. 538—the court reversed the trial court's order, refusing a continuance, upon the ground that the party was confined to his room by illness and unable to attend, notwithstanding the case had been upon the docket for about four years and had been continued a number of times for the appellant.

The court said:

> "Whatever may have been the grounds of previous continuances, appellant was entitled to be present at the trial of his case, if possible, and was not responsible for the misfortune which had overtaken him which prevented his attendance."

The above cases indicate that the illness of a party which prevents his attendance at the trial is generally considered grounds for continuance, where it appears that his presence is indispensable.

Most authorities examined by counsel for your petitioner wherein the trial court's discretion was sustained denying continuance in matters of this nature, were situations wherein the petitioning party was present in court, and the court's judgment was founded on personal observation.

In the present case the petitioner is a member of the bar. He, his counsel, and his physician reported that he was unable to appear for hearing on the date scheduled. The testimony of the physician proclaimed the severity of his illness. Also the trial examiner refused to have a physician of the examiner's choice examine petitioner.

The petitioner was not present in court. He was presented with the unusual dilemma of a court direct-

ing him to proceed in order to defend himself, and his physician admonishing him that to do so might be fatal. His decision to follow the advice of his doctor would be the decision of any reasonable and prudent man. The arbitrary action of the Trial Examiner should not be countenanced by this court. His ruling should be reversed.

There is nothing in the record challenging the good faith of the physician or dentists or of petitioner's counsel.

The record clearly shows that petitioner's inability to attend trial, and that he alone was the sole, essential and necessary witness to prove the allegation of his response to the Secretary's petition, together with the surrounding facts, and if the continuance was not granted he would be deprived of his day in court. The petitioner had been advised by his physician not to engage in any trials. The testimony further shows that the doctor advised petitioner to wear a black patch on his eye, rest and remain in his apartment.

The fact that the petitioner failed to obey his doctor's orders, does not in any manner impute bad faith to his physician. There is no question but that the petitioner is a sick man, and was a sick man at the time of the hearing. The examiner stated (R. 25):

"Mr. Alker is basically a sick man."

but according to the Examiner, the fact that his illness *might* be permanent prevented him from granting a continuance.

2. Under 5 USC, Section 261, and the rules and regulations thereunder, as well as under basic considerations of due process, the Secretary could not lawfully disbar appellant without a hearing

Petitioner's right to a hearing before he could be disbarred was explicitly prescribed by Congress in 5 USC, Section 261; the statute giving the Secretary of the Treasury the authority to regulate the recognition of attorneys and agents to practice before his department. After conferring that authority, the statute goes on to provide:

> "And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, * * * ."

The regulations promulgated by the Government thereunder spell out that right. Section 13.1(c) of Circular 230 states that:

> "Proceedings for suspension, disbarment and reinstatement of licensees to practice before the Treasury Department are subject to procedure prescribed in s. 10.7 of Treasury Department Circular 230, Revised (10.7 of this Subtitle)."

S. 10.7 in turn elaborates the procedure to be followed in proceedings for suspension and disbarment and makes such procedure subject to the provisions of the Administrative Procedure Act (s. 10.7(b)).

The Secretary's decision of January 31, 1956 was promulgated without giving your petitioner the opportunity to controvert those charges in a hearing conducted as prescribed by above statute and regulations.

The Government can not avoid its statutory obligation of granting your petitioner a hearing by stating in its decision of January 31, 1956, that the petitioner

will be offered further opportunity for a hearing provided that within twenty days after date he makes such application and surrenders his enrollment card until termination of proceedings.

The offer to afford your petitioner further opportunity for hearing by the acting Secretary tacitly acknowledges the lack of any legal authority for the Government's action. It is a recognition that the petitioner was not afforded the opportunity for hearing as provided by statute. There is no provision for a temporary suspension of a license pending a further opportunity for hearing. The acting Secretary concedes by this statement that the petitioner was not given a fair hearing in the first instance.

As a result, the acting Secretary was compelled to seek another rationale for his denial of appellant's right to a hearing, and he sought to escape from the dilemma by offering the petitioner a further opportunity for a hearing if he would consent to surrendering his card and agreeing to a suspension of his right to practice. But the Government cannot escape from the fact that the petitioner was not given a hearing as provided by statute. The Government cannot escape from the record in this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition be granted.

Respectfully submitted,

JOHN A. RYAN
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Opinion

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13358

HARRY J. ALKER, JR., *Appellant*

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided April 11, 1957

Mr. John A. Ryan for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Mr. Lewis Carroll*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, FAHY and BASTIAN, Circuit Judges.

PER CURIAM: Charges of professional misconduct were brought against appellant Alker by the Director of Practice of the Treasury Department. Alker was a member of the bar of Pennsylvania and a member of the Treasury Department bar. He was notified of the charges in writing and was offered an opportunity for a hearing before an examiner.[1] After some five or six continuances at Alker's request, the hearing was set for May 20, 1954. Another motion for continuance was made based upon an allegation that appellant was ill and was physically unable to appear. The examiner held a hearing on the motion, took testimony, and denied the motion. The hearing proceeded the next day, neither Alker nor his counsel being

[1] 23 STAT. 258 (1884), 5 U.S.C.A. § 261.

in attendance. Eighteen witnesses testified. The examiner wrote Alker, offering him an opportunity to produce witnesses or evidence or to take depositions. Proposed findings were made, exceptions taken, and briefs filed. The examiner recommended disbarment. Appeal was taken to the Secretary, who offered another opportunity for hearing upon written request. No request was made. The Secretary affirmed the examiner. Alker brought a civil action for declaratory judgment and injunctive relief. The District Court granted summary judgment for the Secretary.

Appellant makes two points: (1) that the examiner abused his discretion in denying a continuance of the hearing set for May 20th and (2) that Alker did not receive a fair hearing. The record does not support either point. The judgment of the District Court is

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

HARRY J. ALKER, JR., PETITIONER

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 344

HARRY J. ALKER, JR., PETITIONER

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia, granting respondent's motion for summary judgment, is not reported (R. 12).[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 1a-2a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1957 (Pet. 1a). On July 10, 1957, the time to file a petition for certiorari was extended to

[1] All record references (designated "R.") are to the "Joint Appendix" attached to petitioner's brief in the court below and filed by petitioner in this Court.

July 30, 1957 and, on August 2, 1957, it was further extended to August 5, 1957. The petition for a writ of certiorari was filed on August 5, 1957. Jurisdiction of this Court is improperly invoked by petitioner under 28 U.S.C. 1291 but apparently rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of the present case, both courts below correctly held that the denial of petitioner's application for a further continuance of an administrative disbarment proceeding did not constitute an abuse of discretion.

STATUTE INVOLVED

The Act of July 7, 1884, 23 Stat. 258, 5 U.S.C. 261, provides:

> § 261. Rules for government of agents representing claimants. The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice be-

fore his department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

STATEMENT

Petitioner, a practicing attorney and member of the Pennsylvania bar, was "disbarred from further practice before the Treasury Department", effective February 28, 1956 (R. 31). The present suit for injunctive relief, seeking to set aside the disbarment order, was then filed (R. 1-5).

A. The Disbarment Proceeding.

On December 16, 1953, the Director of Practice in the Treasury Department filed a detailed Statement of Charges, constituting "grounds for disbarment" of petitioner (R. 37, 44). The Director charged, *inter alia*, that in 1952 petitioner had falsely stated to the Treasury Department that he had filed personal income tax returns for 1946, 1949, 1950; that he had falsified a personal return by "stating that $3,643.11 had been paid by payments on the 1949 Declaration of Estimated Tax, when in truth no payment had been so made"; that he filed and prepared returns for others, "Knowing the deductions [claimed thereon] to be false"; that he had hindered and unreasonably delayed several tax liability investigations conducted by the Internal Revenue Service; and that in various matters he had threatened an Internal Revenue Spe-

cial Agent with "the use of influence in Washington" (R. 37-44).

After being served with these charges, petitioner requested and was furnished with "a Bill of Particulars" to help him "prepare properly his defense" (Pet. 2). On February 24, 1954, he filed an answer, denying the charges.

A hearing on the charges was originally scheduled for March 16, 1954, before a Treasury Department hearing examiner in Philadelphia, but was deferred at petitioner's request to March 30, 1954. After being set down for pre-trial conference on April 6, 1954, the hearing was late. "put off for another six weeks" because of petitioner's illness and the unavailability of counsel and set, at petitioner's request, for Monday, May 17, 1954 (R. 26). Subsequently, after a still further request by petitioner, the May 17, 1954 date was postponed by the examiner and the "hearing was finally fixed for May 20, 1954" (Pet. 3).

On May 18, 1954, petitioner, again asserting he was ill and unable to appear, requested a still further extension beyond the May 20, 1954 date. The examiner, on May 20, 1954, held a hearing on the request for a continuance. At the hearing, petitioner's doctor testified that petitioner was too ill to attend. Two dentists, also testifying on petitioner's behalf, described the poor condition of his teeth. In rebuttal, several special agents of the Internal Revenue Service testified. Their testimony established that petitioner had worked on Thursday, May 13, 1954; that the following day he transacted business at an Internal Revenue Service Office; that on Mon-

day, May 17, 1954, he was in the United States Tax Court in Philadelphia when "court opened at ten o'clock," (R. 22) and that he was in his office building on Tuesday, May 18 (R. 13-24).

After hearing this testimony, the examiner, concluding that petitioner's motion for a further continuance "was not in good faith * * * that he had had, over and over again, opportunity to be heard * * * but that he shunted same, and would as long as possible, if not always, continue to do so," denied the motion (R. 33; 35). The examiner accordingly notified the parties that the hearing on the charges would proceed the following morning, May 21, 1954. Petitioner was advised that his defense witnesses could be presented even if he were absent; that he could wait and testify by deposition at such time as all the oral testimony was in or at any other time convenient to him; and that his answer to the charges could be admitted into the record with a stipulation that petitioner would so testify if present (R. 27).

Petitioner rejected all of these opportunities to present his position. On May 21, 1954, neither he nor his counsel appeared at the hearing at which eighteen witnesses testified in support of the disbarment charges (Pet. App. 2a). At the conclusion of the hearing, the examiner wrote to petitioner again "offering him an opportunity to produce witnesses or evidence or to take depositions" (Pet. App. 2a).

In August, 1954, copies of the transcript of the hearing and exhibits were furnished to petitioner. The Director of Practice then submitted to the examiner proposed findings, conclusions and a support-

ing brief. Copies of these were also furnished to petitioner. In October and December 1954, petitioner filed his exceptions and briefs (R. 8).

On March 2, 1955, the examiner recommended disbarment (R. 37). Petitioner appealed to the Secretary of Treasury. On January 31, 1956, the Secretary ruled that "on the record before him, it must be concluded that the Examiner acted reasonably in denying the motion" for continuance (R. 9). However, after noting petitioner's contention that he should be afforded an "opportunity in a hearing to disprove the charges," the Secretary stated that he was "prepared to grant" petitioner another opportunity if the resultant delay does not prejudice the interests of the Government (R. 9). Accordingly, the Secretary ruled that petitioner could have another opportunity for a hearing providing he requested it in writing and consented to a temporary suspension from practice before the Treasury Department pending final determination of the disbarment proceeding (R. 9). Petitioner did not request the proffered hearing and on February 28, 1956, the order of disbarment was entered by the Department (R. 31).

B. The Present Litigation.

Petitioner filed the present complaint against Secretary of the Treasury Humphrey [2] in the United

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[2] Humphrey resigned and was succeeded by Secretary of the Treasury Anderson on July 29, 1957. But the petition for certiorari, filed August 5, 1957, names the former incumbent as respondent here. See Rule 48 (3), Revised Rules of this Court.

States District Court for the District of Columbia, seeking to set aside the disbarment order (R. 1-5). The District Court granted the Government's motion for summary judgment, based on the record of the administrative disbarment proceedings (R. 11-12). The Court of Appeals affirmed *per curiam* noting that the record does not support petitioner's arguments that he had been denied a fair hearing or that the examiner abused his discretion in denying a continuance beyond May 20, 1954 (Pet. App. 2a).

ARGUMENT

Petitioner's principal contention is that the trial examiner abused his discretion in refusing to grant a further continuance beyond May 20, 1954. But both courts below—in addition to the Secretary of Treasury—reviewed the pertinent facts and found that there was no such abuse. These concurrent factual findings, fully substantiated by the testimony presented before the examiner on the motion for continuance, need not and, we submit, should not be again reviewed here.

Certiorari is not warranted here for the further reason that any error claimed in the refusal to continue did not prejudice petitioner or prevent him from fully presenting his defense. The statute under which petitioner was barred from further practice before the Treasury Department simply requires that he be given "due notice and opportunity for hearing." Act of July 7, 1884, *supra*, p. 2. Similarly, due process requires no more than that the accused attorney in an administrative disbarment proceeding be given

fair and ample opportunity to explain and defend his conduct. *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123; *Kingsland* v. *Dorsey*, 338 U.S. 318; Cf. *Ex parte Wall*, 107 U.S. 265, 288-289; *Selling* v. *Radford*, 243 U.S. 46; *Theard* v. *United States*, 354 U.S. 278, 282. That petitioner was afforded such an opportunity is not open to serious challenge. Wholly apart from the oral hearing attacked here because of the examiner's refusal to grant an additional postponement, there were numerous additional opportunities given to petitioner to present his defense. *Supra*, pp. 5-6. Thus, petitioner was given specific charges and a detailed bill of particulars. He was advised that he could testify by deposition [3] during or after the oral hearing and before or after the examiner's decision. He was even offered an oral hearing after his appeal to the Secretary of Treasury. Having rejected all of these opportunities to present his defense, petitioner cannot now complain. Indeed, his refusal to exhaust his administrative remedies and opportunities destroys any right he might otherwise have had to judicial relief. *National Council of American-Soviet F.* v. *Brownell*, 243 F. 2d 222, 225 (C.A.D.C.); see *Yakus* v. *United States*, 321 U.S. 414, 434; *United States* v. *Holpuch Co.*, 328 U.S. 234, 240.

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[3] Due process certainly does not require either an oral hearing or the accused attorney's personal attendance at the hearing. *Selling* v. *Radford*, 243 U.S. 46, 51-52, shows that it is sufficient to allow an attorney to present his objections to disbarment in a printed brief.

Petitioner attempts to justify his failure to accept the Secretary's post-appeal offer of a hearing on the ground that it was conditioned on a temporary suspension of his license to practice before the Treasury Department. But this condition, found by the Secretary to be essential to protection of the public interest, was plainly valid. The information then before the Secretary fully justified a summary suspension pending a further opportunity to petitioner to show cause why he should not be permanently disbarred. In any event, petitioner's explanation of his refusal of the Secretary's post-appeal offer applies only to that particular offer and to none of the several, earlier and unconditional invitations to him to present his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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